

STEVEN G. KALAR
Federal Public Defender
Northern District of California
GALIA AMRAM
Assistant Federal Public Defender
19th Floor Federal Building - Box 36106
450 Golden Gate Avenue
San Francisco, CA 94102
Telephone: (415) 436-7700
Facsimile: (415) 436-7706
Email: Galia_Amram@fd.org

Counsel for Defendant SHAFI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ADAM SHAFI,

Defendant.

Case No.: CR 15-582 WHO

**DEFENDANT SHAFI'S REPLY IN
SUPPORT OF MOTION TO DISMISS**

Court: Courtroom 2, 17th
Floor

Hearing Date: April 13, 2017

Hearing Time: 1:30 p.m.

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	1
I. 18 U.S.C. §2339B IS AN ELEMENT	1
A. THE PLAIN LANGUAGE OF 18 U.S.C. §2339B, ALONG WITH PRINCIPLES OF STATUTORY CONSTRUCTION, INDICATE SUBSECTION (H) IS AN ELEMENT	2
B. SUBSECTION (H) IS AN ELEMENT BECAUSE OTHERWISE THE STATUTE RAISES CONSTITUTIONAL CONCERNS.....	6
C. UNDER <i>RUSSELL</i> , 369 U.S. 749 (1962), EVEN IF SUBSECTION H IS A NOT AN ELEMENT, COORDINATION WITH A FTO STILL MUST BE ALLEGED IN THE INDICTMENT.....	9
II. THE GOVERNMENT BEARS THE BURDEN OF PROOF OF SUBSECTION (H) EVEN WHEN IT CHARGES MATERIAL SUPPORT UNDER AN ATTEMPT THEORY.	11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<i>Ashcroft v. Free Speech Coal.</i> , 122 S. Ct. 1389 (2002)	12
<i>Conn. Nat'l Bank v. Germain</i> , 503 U.S. 249 (1992)	2
<i>Gomez v. United States</i> , 490 U.S. 858 (1989)	6
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010)	1, 7, 9
<i>Humanitarian Law Project v. U.S. DOJ</i> , 352 F.3d 382 (9th Cir. 2003)	7
<i>Liparota v. United States</i> , 471 U.S. 419 (1985)	5, 6, 8-9
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	2, 3, 4, 7
<i>Rewis v. United States</i> , 401 U.S. 808 (1971)	5
<i>Richardson v. United States</i> , 526 U.S. 813 (1999)	3, 7
<i>Russell v. United States</i> , 369 U.S. 749 (1962)	2, 9
<i>Schad v. Arizona</i> , 501 U.S. 624 (1991)	9
<i>United States v. Ahmed</i> , 94 F. Supp. 3d 394 (E.D.N.Y. 2015)	10
<i>United States v. Ahmed</i> , No. 15-49 (MJD/FLN), 2015 U.S. Dist. LEXIS 171561 (D. Minn. Sept. 1, 2015)	5
<i>United States v. Awan</i> , 459 F. Supp. 2d 167 (E.D.N.Y. 2006)	10
<i>United States v. Hashmi</i> , No. 06 Crim. 442 (LAP), 2009 WL 4042841 (S.D.N.Y. Nov. 17, 2009)	10
<i>United States v. Hui Hsiung</i> , 778 F.3d 738 (9th Cir. 2014)	3, 6
<i>United States v. Kaziu</i> , 559 F. App'x 32 (2d Cir. 2014)	11
<i>United States v. Lonich</i> , 2016 WL 324039 (N.D. Cal. Jan 27, 2016)	3

1	<i>United States v. Pugh</i> ,	
2	No. 15-CR-116, 2015 WL 9450598 (E.D.N.Y. Dec. 21, 2015)	5, 6
3	<i>United States v. Taleb-Jedi</i> ,	
4	566 F. Supp. 2d 157 (E.D.N.Y. 2008)	10
5	<i>United States v. Warsame</i> ,	
6	537 F. Supp. 2d 1005 (D. Minn. 2008)	10
7	Statutes	
8	18 U.S.C. § 2339B	<i>passim</i>

REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

According to the government, Mr. Shafi may be charged, detained pending trial, and tried for providing material support to a terrorist organization under 18 U.S.C. § 2339B without the government ever needing to prove coordination between him and al-Nusra. This despite two things: 1. A statutory provision explicitly requiring that “[n]o person may be **prosecuted**” under § 2339(B) unless he or she actually worked under the terrorist organization’s direction or control or was a manager of that organization, 18 U.S.C. § 2339B(h); and 2. A Supreme Court case holding 18 U.S.C. § 2339B constitutional because of the addition of subsection (h). *Holder v. Humanitarian Law Project*, 561 U.S. 1, 23 (2010) (“HLP”).

ARGUMENT¹

I. 18 U.S.C. § 2339B IS AN ELEMENT

The government’s argument is that it does not need to allege coordination between a defendant and a FTO in an Indictment, nor bear the burden of proof at trial, because

¹ In its Opposition, the government included a culled set of facts irrelevant to the purely legal question before this Court. United States Opposition to Defendant’s Motion to Dismiss at 1 [Docket No. 133] (“Opp’n”). Since the particular facts of this case do not change whether the government did or did not fail to allege an element of the charge in the Indictment, the defense is unclear on the purpose of including such facts. However, the defense does point out that the government’s description of Mr. Shafi’s father’s statements is misleading in light of a FBI 302 documenting an interview in which Mr. Shafi’s father told the FBI:

SALAMA was very concerned and frightened for his son and went to the US Embassy, as well as the Egyptian authorities, to report him missing. SALAMA was initially redirected to a website and was not getting the attention he felt the matter deserved. He was there to report an emergency and felt most others there were trying to get routine business done, like visas. He felt he had to use eye catching language to get someone’s attention, which was part of the reason he made the statements about fearing SHAFI had been recruited . . . He and his wife were very protective of their children . . . Each member of the family had an app on their phones which shared their location at all times . . . SALAMA did not think SHAFI had contact with anyone overseas before his travel to Turkey nor did he think SALAMA had contact with anyone since their return. Declaration of Galia Amram In Support Of Reply To Motion To Dismiss, Exh. A [AS-00003.]

1 subsection (h) is a “definition” instead of an “element.” Specifically, the government argues
 2 that the relevant “element” in 18 U.S.C. § 2339B is “material support,” that “personnel” is a
 3 “means” of committing the element of material support, and that subsection (h) provides a
 4 definition of “personnel.” Opposition to Motion to Dismiss (Docket No. 133) (“Opp’n”) at 3-
 5 11 and n. 2.

6 The government’s position is contradicted by the plain language of the statute (including
 7 the subsections directly above and below subsection (h)); the Supreme Court’s recent
 8 decision in *Mathis v. United States*, 136 S.Ct. 2243 (2016) – which held that a statutory
 9 provision is an element if it is not “extraneous to the crime’s legal requirements” – and the
 10 rule of lenity. Subsection (h) must also be an element because otherwise the statute raises
 11 constitutional concerns and criminalizes innocent conduct. And under *Russell v. United*
 12 *States*, 369 U.S. 749, 770 (1962), even if subsection (h) is not an element, coordination with
 13 a FTO must be alleged in the Indictment because it is an “essential fact.” Finally, contrary to
 14 the government’s claim, charging an attempted violation of the material support statute does
 15 not obviate the government’s burden of showing coordination as required by section
 16 2339B(h), as attempts are specifically included in subsection (h).

17 **A. THE PLAIN LANGUAGE OF 18 U.S.C. § 2339B, ALONG WITH**
 18 **PRINCIPLES OF STATUTORY CONSTRUCTION, INDICATE**
 19 **SUBSECTION (H) IS AN ELEMENT**

20 The Supreme Court has “stated time and again that courts must presume that a legislature
 21 says in a statute what it means and means in a statute what it says there.” *Connecticut Nat.*
 22 *Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Here, the plain meaning of the words in
 23 subsection (h) indicates it is an element not, as the government contends, a definition of
 24 “personnel.” Subsection (h) states: “[n]o person may be prosecuted unless...” It does not say
 25 “‘personnel’ is defined as...” In fact, there is a “Definitions” section to section 2339B, just
 26 one subsection above (18 U.S.C. § 2339B(g)), where Congress could have easily placed the
 27 language of subsection (h), if it was in fact a definition.

28 Congress also used the words “[n]o person may be prosecuted unless...” *not* “no person
 may be convicted unless....” The only way to give effect to Congress’ language that “no

1 person may be prosecuted unless” is if subsection (h) is an element that a grand jury must
 2 find for the government to get an Indictment. If a grand jury need not find the requirements
 3 of subsection (h), then a person may be prosecuted for acting entirely independently of the
 4 foreign terrorist organization, in direct contravention of the explicit language of the statute.
 5 *See Richardson v. United States*, 526 U.S. 813, 818 (1999) (“When interpreting a statute, we
 6 look first to the language.”)

7 Moreover, as explained in Section I.B. of the opening brief, the language of subsection
 8 (h) is consistent with language that the Ninth Circuit held, in *United States v. Hui Hsiung*,
 9 778 F.3d 738 (9th Cir. 2014) creates an element. In response to this, the government argued
 10 that *Hui Hsiung*’s holding does not apply because *Hui Hsiung* is limited to the Sherman Act.
 11 Opp’n. at 7-9.² The *Hui Hsiung* Court did not say that its holding was limited to the Sherman
 12 Act, nor has the government cited any other case, from the Ninth Circuit or otherwise,
 13 finding *Hui Hsiung* so limited.³

14 In addition, subsection (h) meets the definition of an element as that term is defined in the
 15 Supreme Court’s recent decision in *Mathis v. United States*, 136 S.Ct. 2243 (2016). In
 16 *Mathis*, the Supreme Court addressed the difference between elements and “the various
 17 factual means” of committing an offense. *Id.* at 2249. The *Mathis* Court explained that:

18
 19 ² The government also argued, in a footnote, that “personnel” is a “means” of committing the
 20 “element” of “material support.” Opp’n. at n. 2. Presumably the point of this is to say that if
 21 “personnel” is a means, then subsection (h) cannot be an element. But that argument is
 22 foreclosed by case law establishing that statutes sometimes have elements that only apply when
 23 the Government chooses to proceed on a particular theory of prosecution. *See Hui Hsiung*, 778
 24 F.3d at 756 (the FTAIA element only applied because the Government proceeded on a
 domestic effects theory); *see also United States v. Lonich*, 2016 WL 324039, *7-8 (N.D. Cal.
 2016) (finding that duty to disclose is an element of bank or wire fraud where the prosecution
 proceeds on an omissions theory). The defense made this point in its opening brief, but the
 government did not address it.

25 ³ In another footnote, the government briefly cited case law on exceptions to statutes as
 26 affirmative defenses, Opp’n. at 4, even though the text of subsection (h) clearly reads as an
 27 element, not an exception. The government then stated in a footnote that it was not actually
 28 arguing that subsection (h) is an affirmative defense. Opp’n. at n. 4. This concession makes
 sense as Section 2339B has a section titled “Exceptions.” 18 U.S.C. § 2339B(j). So if
 subsection (h) was meant to be an exception, Congress would have placed it in the
 “Exceptions” section of the statute.

1 “[e]lements’ are the ‘constituent parts’ of a crime’s legal definition — the things the
 2 ‘prosecution must prove to sustain a conviction.’ Black’s Law Dictionary 634 (10th ed.
 3 2014). At a trial, they are what the jury must find beyond a reasonable doubt to convict the
 4 defendant.” *Id.* at 2248. “Facts, by contrast, are mere real-world things — extraneous to the
 5 crime’s legal requirements. (We have sometimes called them “brute facts” when
 6 distinguishing them from elements.) They are ‘circumstance[s]’ or ‘event[s]’ having no
 7 ‘legal effect [or] consequence’: In particular, they need neither be found by a jury nor
 8 admitted by a defendant.” *Id.* (internal citations omitted).

9 There can be no doubt that subsection (h) is an element as that term is defined in *Mathis*.
 10 As explained in detail in the opening brief, subsection (h) was added to the material support
 11 statute in response to the Ninth Circuit’s finding that section 2339B was unconstitutional,
 12 Defendant’s Motion to Dismiss at 3-5 (Docket No. 123) (“MTD”), and the Supreme Court
 13 then upheld the constitutionality of section 2339B because of the addition of subsection (h).
 14 *Id.* With such a legislative history, it is illogical to deem subsection (h) “extraneous to the
 15 crime’s legal requirements.” *Mathis*, 136 S.Ct. at 2248. A provision of a statute that is
 16 explicitly added, during the pendency of a constitutional challenge, to make the statute pass
 17 constitutional muster, and then found by the Supreme Court to in fact render that statute
 18 constitutional, cannot “hav[e] no legal effect or consequence.” *See id.* (describing means vs.
 19 elements).

20 In fact, in Section 2339B(i), one section below subsection (h), Congress stated the
 21 following:

22 (i)Rule of Construction.—

23 Nothing in this section shall be construed or applied so as to abridge the exercise
 24 of rights guaranteed under the First Amendment to the Constitution of the United
 25 States.

26 18 U.S.C. § 2339B(i).

27 Considering this express directive from Congress, it is hard to see how subsection (h) can be
 28 construed in a way that neither protects a person from prosecution (because it need not be

1 alleged in an Indictment) nor from conviction (because it need not be proved beyond a
2 reasonable doubt).

3 Finally, if the Court finds the statute ambiguous as to whether subsection (h) is an
4 element, a definition, or an affirmative defense, the rule of lenity compels this Court to find
5 subsection (h) to be an element. The Supreme Court has long recognized the principle that
6 “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”
7 *Rewis v. United States*, 401 U.S. 808, 812 (1971). Application of the rule of lenity ensures
8 that criminal statutes will provide fair warning concerning conduct rendered illegal and strike
9 the appropriate balance between the legislature, the prosecutor, and the court in defining
10 criminal liability. *Liparota v. United States*, 471 U.S. 419, 427 (1985) (rule of lenity
11 compelled a finding that specific intent was element of statute). Although the rule of lenity is
12 not to be applied where doing so would conflict with the implied or expressed intent of
13 Congress, the rule provides a time-honored interpretive guideline when the congressional
14 purpose is unclear. *Id.*

15 The rule of lenity is particularly important when this Court considers what weight, if any,
16 to give to the prior district court opinions on the role of subsection (h). There appear to be
17 only two district courts that have addressed whether subsection (h) is an element. In *United*
18 *States v. Pugh*, No. 15-CR-116, 2015 WL 9450598 (E.D.N.Y. Dec. 21, 2015), the district
19 court found it was a definition, and in *United States v. Ahmed*, No. 15-CR-49, 2015 U.S.
20 Dist. LEXIS 171561 (D.Mn. Sept., 09, 2015), the district court found it was an affirmative
21 defense. No circuit courts seem to have addressed this issue. The government chose not to
22 even argue the position taken by the *Ahmed* court. See Opp’n, at n. 4 (declining to argue that
23 subsection (h) is an affirmative defense). Instead, the government cited *Pugh* extensively in
24 support of its argument that subsection (h) is a definition. However, *Pugh* “recognize[d] that
25 plausible alternative readings of the statute are defensible.” *Pugh*, 2015 WL 9450598 at 8. In
26 light of this acknowledgment, the rule of lenity should have compelled a finding that
27 subsection (h) is an element. That the *Pugh* court did not so hold may have been the result of
28 the fact that *Pugh* did not address the rule of lenity, nor the First Amendment implications of

1 finding subsection (h) a definition, nor the Supreme Court’s decision in *Mathis* defining an
 2 element, nor any of the Supreme Court cases explaining the doctrine that statutes should be
 3 interpreted to avoid constitutional concerns. *Id.* at 7-11. The *Pugh* court was also not bound
 4 by the Ninth Circuit’s decision in *Hui Hsiung*, 778 F.3d 738, finding similar language to be
 5 an element.

6 **B. SUBSECTION (H) IS AN ELEMENT BECAUSE OTHERWISE THE**
 7 **STATUTE RAISES CONSTITUTIONAL CONCERNS**

8 In discerning the elements of a criminal statute, the Court must look to whether possible
 9 interpretations raise constitutional concerns. *See Gomez v. United States*, 490 U.S. 858, 864
 10 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders
 11 constitutional issues if a reasonable alternative interpretation poses no constitutional
 12 question”).⁴ Here, not only does the plain language of the statute, along with principles of
 13 statutory construction, indicate that subsection (h) is an element, but the interpretation
 14 advanced by the government would render the statute unconstitutional.

15 Despite the government’s claims to the contrary, Congress amended the material support
 16 statute to make it pass constitutional muster. *See United States v. Afshari*, 635 F.Supp.2d
 17 1110, 1120 (C.D. Cal. 2009) (“IRTPA’s amendment seems to go further than what HLP I
 18 suggested was necessary to save the statute ... HLP I suggested that Congress could
 19 constitutionally prohibit an individual from advocating on behalf of a foreign terrorist
 20 organization where the individual was “under the direction or control” of the foreign terrorist
 21 organization ...”); *id.* at 1120 (In “enacting IRTPA, the Congress did what the Ninth Circuit
 22 could not do, it rewrote the statute to save it against constitutional attacks.”)

23
 24 ⁴ In *Liparota*, 471 U.S. at 424, the Supreme Court addressed the elements of the food stamp
 25 fraud statute. In its Opposition brief, the government cited *Liparota* for the proposition that:
 26 “[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly
 27 in the case of federal crimes, which are solely creatures of statute.” *Id.* at 424. However, a
 28 footnote at the end of that sentence, not cited by the government, stated: “Of course, Congress
 must act within any applicable constitutional constraints in defining criminal offenses. In this
 case, there is no allegation that the statute would be unconstitutional under either
 interpretation.” *Id.* at n. 6. Here, there is an allegation that the statute is unconstitutional if
 subsection (h) is not an element.

1 That Congress added subsection (h) to ensure the constitutionality of the material support
 2 statute is evidenced by three things: 1) the legislative history of the statute which makes clear
 3 that it was amended in response to the Ninth Circuit’s ruling in *Humanitarian Law Project v.*
 4 *U.S. Department of Justice*, 352 F.3d 382, 385 (9th Cir. 2003); 2) the Supreme Court opinion
 5 in *HLP*, which stated explicitly that subsection (h) was added to address constitutional
 6 concerns, *HLP*, 561 U.S. at 35 (“We also find it significant that Congress has been conscious
 7 of its own responsibility to consider how its actions may implicate constitutional concerns);
 8 and 3) the addition of subsection (i) which shows that Congress was concerned with ensuring
 9 that the material support statute was not interpreted in a way that jeopardized people’s First
 10 Amendment rights. 18 U.S.C. § 2339B(i). Considering this history, it is illogical of the
 11 government to argue that subsection (h) is not necessary to the statute’s constitutionality. It
 12 is necessary, and, as such, it must be given actual legal significance. *Mathis*, 136 S.Ct. at
 13 2248 (a term is not an element if it is “extraneous to the crime’s legal requirements.”)

14 Moreover, Congress needed to act “within [] applicable constitutional constraints in
 15 defining” the material support statute because the material support statute expanded criminal
 16 liability beyond what traditionally had been considered criminal. *Liparota*, 471 U.S. at n. 6.
 17 In fact, the Supreme Court stated that the material support statute would possibly not pass
 18 constitutional muster, even with the addition of subsection (h), if the statute applied to
 19 domestic organizations. *HLP*, 561 U.S. at 39 (“We also do not suggest that Congress could
 20 extend the same prohibition on material support at issue here to domestic organizations.”)
 21 When a statute expands criminal liability beyond what is traditionally considered criminal,
 22 the Supreme Court has been especially cautious in finding contested provisions to be
 23 elements that the government must prove beyond a reasonable doubt. *See Richardson*, 526
 24 U.S. at 819-820 (“Government’s arguments for an interpretation of [the contested provision]
 25 as means are not sufficiently powerful to overcome the considerations just mentioned, those
 26 of language, tradition, and potential unfairness.”)

27 Congress also needed to act “within applicable constitutional constraints” because of the
 28 breadth of the material support statute. In *Richardson*, 526 U.S. at 819, the Supreme Court

1 had to interpret the statute criminalizing participation in a continuing criminal enterprise, 21
 2 U.S.C. § 848. This statute defines “continuing criminal enterprise” (CCE) as involving a
 3 violation of the drug statutes where “such violation is part of a continuing series of
 4 violations.” § 848(c); *Richardson*, 526 U.S. at 815. The district court judge rejected the
 5 defendant’s proposal to instruct the jury that it must unanimously agree on which three acts
 6 constituted the series of violations. Instead, the judge instructed the jurors that they must
 7 unanimously agree that the defendant committed at least three federal narcotics offenses, but
 8 did not have to agree as to the particular offenses. The Supreme Court reversed. It held that
 9 “a jury in a federal criminal case brought under § 848 must unanimously agree not only that
 10 the defendant committed some ‘continuing series of violations’ but also that the defendant
 11 committed each of the individual “violations” necessary to make up that “continuing series.”
 12 *Id.* See also *id.* at 820. (“To hold that each “violation” here amounts to a separate element is
 13 consistent with a tradition of requiring juror unanimity where the issue is whether a
 14 defendant has engaged in conduct that violates the law. To hold the contrary is not.”)

15 In interpreting the contested provisions as elements, the Supreme Court noted its concern
 16 over the breadth of the statute. *Id.* at 819 (“The CCE statute’s breadth also argues against
 17 treating each individual violation as a means, for that breadth aggravates the dangers of
 18 unfairness that doing so would risk.”) The Court held that “the Constitution itself limits a
 19 State’s power to define crimes in ways that would permit juries to convict while disagreeing
 20 about means, at least where that definition risks serious unfairness and lacks support in
 21 history or tradition. We have no reason to believe that Congress intended to come close to,
 22 or to test, those constitutional limits when it wrote this statute.” *Id.* at 820.

23 Without the limiting provision of subsection (h), the material support statute, like the
 24 CCE statute, is very broad. If anything the breadth of the material support statute is of even
 25 greater concern than the CCE statute because it risks criminalizing innocent conduct (unlike
 26 the CCE in which the underlying violations are themselves crimes). *Liparota*, 471 U.S. at
 27 426 (in determining the elements of a statute, a court should consider whether a particular
 28 interpretation of the statute would “criminalize a broad range of apparently innocent

conduct.”) Subsection (h) is the material statute’s bulwark against the criminalization of both innocent conduct and conduct protected by the First Amendment – it protects from prosecution those who act independently of a FTO. *See HLP*, 561 U.S. at 36; *Schad v. Arizona*, 501 U.S. 624, 633 (1991) (plurality opinion) (“[I]t is an assumption of our system of criminal justice ... that no person may be punished criminally save upon proof of some specific illegal conduct”).⁵ As a result, subsection (h) must be an element.

C. UNDER *RUSSELL*, 369 U.S. 749 (1962), EVEN IF SUBSECTION H IS A NOT AN ELEMENT, COORDINATION WITH A FTO STILL MUST BE ALLEGED IN THE INDICTMENT

If this Court finds that Section 2339B(h) is not element of the offense, it should nevertheless find that the provision is an “essential fact” that must be alleged in the Indictment, as without it there would be no assurance that the grand jury indicted Mr. Shafi for anything other than exercising his constitutional rights. In the *Russell* case, the Supreme Court considered the sufficiency of an indictment charging an offense under 2 U.S.C. § 192. *Russell*, 369 U.S. at 751-752. That statute criminalizes a willful failure to answer questions “pertinent to a question under inquiry” by a congressional entity. *Id.* Each indictment in question failed to identify the subject under congressional subcommittee inquiry at the time the defendants were questioned. Although the indictment contained the questions themselves that the defendants refused to answer, it failed to state the “subject of the inquiry,” thus handicapping the defendants from making an argument that the refused answers were not pertinent to that subject and hence, the failure to answer was not criminal. Although the “subject of the inquiry” was not an essential element of the crime charged, it was deemed by the Supreme Court to be an “essential fact” necessary for the government to allege in the indictment so the grand jury could make the initial determination as to whether probable cause existed for the crime. *Id.* at 770 (expressing concern that a defendant could then be

⁵ It bears noting that the Supreme Court clearly held, in addressing whether a specific intent to further the FTO’s purpose must be read into the statute to address First Amendment concerns, that Section 2339B does not prohibit mere membership in a FTO. *HLP*, 561 U.S. at 18. This is another reason why subsection (h) must actually matter. If it is relegated to a “definition” than Section 2339B could, as a practical matter, be applied in ways that do criminalize membership in a FTO.

1 convicted on the basis of facts not found by, and perhaps not even presented to, the grand
2 jury which indicted him.)

3 *Russell* is particularly crucial here because numerous court have already found that its
4 holding applies to the material support statute. Specifically, courts have found that the
5 government must put in the Indictment the “means” with which a person allegedly violated
6 the material support statute (such as providing expert assistance, training, currency, etc.),
7 even though the “means” are listed in the “Definitions” section of the material support
8 statute. *United States v. Awan*, 459 F. Supp. 2d 167, 175 (E.D.N.Y. 2006), aff’d 384 F.
9 App’x 9 (2d Cir. 2010) (summary order) (citing *Russell* and holding that the government
10 must allege in the Indictment what activity the grand jury considered as material support);
11 *see also United States v. Taleb-Jedi*, 566 F.Supp.2d 157, 166 (E.D.N.Y. 2008); *United States*
12 *v. Ahmed*, 94 F.Supp.3d 394, 425 (E.D.N.Y. 2015); *United States v. Hashmi*, No. 06-CR-442
13 (LAP), 2009 WL 4042841, at *3-4 (S.D.N.Y. Nov. 18, 2009) (finding that an indictment that
14 enumerated specific types of resources that the defendant allegedly provided, “provide[d]
15 ample notice as to what acts are at issue,” and allowed the defendant to “prepare a defense
16 based on the information provided”); *cf. United States v. Warsame*, 537 F. Supp. 2d 1005,
17 1011 (D. Minn. 2008) (finding that a bill of particulars that identified that the material
18 support alleged was personnel, currency, and training, was sufficient); *see also* 18 U.S.C. §
19 2339B(g)(4) (providing the definition of “material support or resources”).

20 The term “sexually explicit conduct” in child pornography crimes is another example of
21 when a “definition” must be alleged in an Indictment. In fact, the government cited the
22 example of “sexually explicit conduct” in its Opposition to show how a constitutionally
23 required definition need not be an “element.” Opp’n., at 7. What the government did not
24 say, however, was that the Ninth Circuit model jury instructions actually require the
25 government to prove “sexually explicit conduct,” and the government does include “sexually
26 explicit conduct” in the Indictments when it charges child pornography crimes. *United States*
27 *v. Gregory Wayne Shook*, Case No. 3:15-CR-00589-VC (N.D. Cal.) [Docket 1] (filed
28 December 17, 2015); *United States v. Edmund Lee*, Case No. 3:14-CR-00314-EMC (N.D.

Cal.) [Docket 1] (filed June 12, 2014); *see* Ninth Circuit Model Jury Instruction 8.181. This shows that regardless of whether a term is labelled a “definition,” an “element” or a “means,” if it is essential to the statute’s constitutionality, it must be alleged in the Indictment and proved beyond a reasonable doubt by the government.

II. THE GOVERNMENT BEARS THE BURDEN OF PROOF OF SUBSECTION (H) EVEN WHEN IT CHARGES MATERIAL SUPPORT UNDER AN ATTEMPT THEORY.

At the end of its Opposition, the government briefly argues that it does not bear the burden of proof of subsection (h) because it charged an attempted violation of the material support statute. Opp’n., at 11-12. The only authority cited by the government for this proposition is an unpublished Second Circuit opinion that briefly rejected an insufficiency of the evidence challenge to an attempted material support conviction. *United States v. Kazuu*, 559 F.App’x 32, 37 (2d Cir. 2014). The Second Circuit did not address at all the constitutional implications of such a holding – there was no mention of the Supreme Court’s holding in *HLP*, nor of subsection (i)’s requirement that the statute not be interpreted in a manner that abridges the First Amendment; there was also no mention of the rule of lenity nor the Supreme Court’s decision in *Russell*, nor the doctrine of avoiding an interpretation of a statute that conflicts with the constitution. *Kazuu* therefore provides no guidance on this issue.

The government’s interpretation, in addition to lacking legal authority, is also contradicted by the express wording of Section 2339B(h). Subsection (h) includes attempts in its proscription on prosecution. It says:

No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly ... **attempted** to provide ... a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control ...

18 U.S.C. § 2339B(h).

Congress explicitly stated that subsection (h)’s requirement of coordination applies to attempts (and conspiracies) just as it applies to completed acts. *Id.* The government cannot ask this Court to ignore the plain text of the material support statute. Especially when doing

1 so would render subsection (h) – and also the Supreme Court’s decision in *HLP* – utterly
 2 meaningless. Because under the government’s interpretation, the government could simply
 3 allege an attempt anytime it lacked evidence of coordination. Separate from the fact that
 4 subsection (h) explicitly includes attempts, such a construction would mean people charged
 5 under an attempt theory would have less protection for their First Amendment rights than
 6 those defendants who actually completed the act of material support. It cannot be that after
 7 the Ninth Circuit went to all the trouble of declaring Section 2339B unconstitutional,
 8 Congress went to the trouble of amending it, and the Supreme Court went through the trouble
 9 of finding the statute constitutional because of the amendment, that the government can get
 10 around subsection (h) by simply saying that because the defendant did not succeed in his
 11 alleged goal and only attempted to violate the material support statute, no constitutional
 12 concerns exist.

13 Finally, it bears mentioning that the government proffered no response to the argument in
 14 the opening brief that under *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 1396, 1406
 15 (2002), the government must bear the burden of proof when First Amendment concerns exist.
 16 MTD at 9.

17 CONCLUSION

18 This Court should follow Congress’ express directive in 18 U.S.C. § 2339B(i) and
 19 interpret the material support statute consistent with the First Amendment: it should find that
 20 the government cannot prosecute someone for providing material support, in the form of
 21 personnel, to a FTO unless a grand jury finds that the “defendant knowingly ... attempted to
 22 provide ... a foreign terrorist organization with 1 or more individuals (who may be or include
 23 himself) to work under that terrorist organization’s direction or control ...” 18 U.S.C. §
 24 2339B(h), and that the government cannot convict someone unless and until they can prove
 25 that very same thing at trial beyond a reasonable doubt.

26 \\\

27 \\\

28 \\\

Respectfully submitted,

March 23, 2017
Dated

STEVEN G. KALAR
Federal Public Defender
Northern District of California

/S

GALIA AMRAM
Assistant Federal Public Defender